Inner City Broadcasting Corporation *and* American Federation of Television and Radio Artists, New York Local, AFL–CIO. Case 2–CA–19506

18 June 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 7 February 1984 Administrative Law Judge Steven Davis issued the attached decision. The General Counsel filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions[1] and to adopt the recommended Order.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Inner City Broadcasting Corporation, New York, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order, except that the attached notice is substituted for that of the administrative law judge.

[1] In agreeing with the judge's conclusion that the Respondent did not violate the Act by failing to furnish certain financial information requested by the Union, we find it unnecessary to rely on his finding that the question concerning late payment of pension and welfare contributions was not an issue for negotiations. Nor do we rely on his finding that the payments were up to date at the time of the hearing; there is no record evidence on the point. Nor do we rely on the judge's finding that the Union was seeking all financial records of the Respondent; from the record, it appears that the Union sought only such information that would support the Respondent's "cash flow" claim.

In agreeing with the judge's conclusion that the requested information was not reasonably necessary to the Union, we note that when the Respondent explained the payments were late because of cash-flow problems or considerations, it, in effect, admitted that the payments were late. Thus, assuming lateness was grievable, the Union had no need of any further information in order to decide whether to file a grievance. Cf. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 437 (1967) (Employer must provide information that "would be of use to the union" in deciding whether to process a grievance). Nothing in the record indicates that the Union made its request because of concerns about future contributions.

[2] The judge inadvertently failed to conform his notice with his recommended Order.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT delay in complying with the requests of American Federation of Television & Radio Artists, New York Local, AFL–CIO, for information necessary for, and relevant to, the Union's performance of its function as the exclusive collective-bargaining representative of our employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

INNER CITY BROADCASTING CORPORATION

DECISION

STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge. Pursuant to a charge filed on March 15, 1983,[1] and a first amended charge filed on April 7, by American Federation of Television and Radio Artists, New York Local, AFL–CIO (Union), an amended complaint and notice of hearing was issued by Region 2 of the National Labor Relations Board on August 9, against Inner City Broadcasting Corporation (Respondent).

The complaint alleges essentially that in violation of Section 8(a)(5) and (1) of the Act, Respondent:

(a) Failed to furnish certain requested financial documents, (b) delayed in furnishing certain requested information concerning bargaining unit work performed by employees not covered by the collective-bargaining agreement, and (c) on two separate occasions, conditioned reaching agreement on the terms of a contract on the Union's withdrawal of its unfair labor practice charge and its demands for arbitration.

Respondent's answer denied the material allegations of the complaint and a hearing was held before me in New York City on September 12.

FINDINGS OF FACT

I. JURISDICTION

Respondent, a New York corporation having its office amd place of business in New York City, has been engaged in the ownership and operation of radio stations WLIB–AM and WBLS–FM. Respondent annually de-

[1] All dates hereafter are in 1983 unless otherwise stated.

rives gross revenues in excess of $100,000 from its business operations, and also annually purchases and receives at its facility products, goods, and materials valued in excess of $5,000 directly from firms located outside New York State. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Requests for Information*

1. Facts

a. *The request of February 25*

Respondent and the Union have had a collective-bargaining relationship for many years, with the Union representing, in separate units, with separate contracts, certain employees of radio stations WBLS and WLIB.[2] Both agreements expired on February 15.

In mid-February, the Union's pension and welfare office received a statement of account from Respondent with payment for the pension and welfare contributions due from September, October, November, and December 1982. The payment for such contributions was based on services performed by the employees in those months.

On February 25, at a bargaining session for a new contract, Randolph Paul, the Union's assistant executive secretary, asked Charles Warfield, Respondent's vice president and general manager, certain questions concerning the salaries of and hours worked by certain employees. Paul also asked Warfield why the pension and welfare payment was made so long after the services were performed. Paul added that there were omissions and inaccurate statements made in the pension and welfare statement of account that Respondent prepared and submitted.

Warfield replied that the payments were late because of "cash flow problems" experienced by Respondent and that he would investigate the alleged omissions and inaccuracies and contact the Union regarding them.

Later in the meeting, Paul advised Warfield that timely receipt of pension and welfare payments is very important to the Union and the employees. Paul also told Warfield that since he (Warfield) claimed that the late payment was due to a cash-flow problem, Paul was requesting "all financial information, documents and data that the Company had," to support its statement that cash-flow problems caused its late payment.

Warfield refused the request for financial information, stating that Respondent was not claiming an "inability to pay."

The financial information requested was never received by the Union and the Union did not make a written request for any documents.[3]

There was much evidence concerning whether the pension and welfare payments were late. According to the Union, the AFTRA Code of Fair Practice for Network Television Broadcasting states that such payment is due 15 days after the performance of services by the employee. The code was incorporated by reference in the two contracts with Respondent, although the code itself was not offered at the hearing. No evidence was adduced, therefore, as to what, in fact, the code says regarding payment. Warfield testified that it was his practice to make such payments on an irregular basis, when called by the pension and welfare fund office. Indeed, union witness Kim Roberts stated that in the past Respondent made payments which were 2 to 3 months late.

b. *The request of March 10*

Prior to March 10, union official Roberts received information that Larry Hardesty and Claude Tait had not been paid for on-air services pursuant to the collective-bargaining agreement. Neither employee was a member of the bargaining unit—Hardesty being an engineer and Tait being an editor. However, both performed on-air services as sports reporters which is unit work, and it was the Union's position that they be paid for such work pursuant to the contract.

At a March 10 grievance meeting, Roberts demanded payment, pursuant to the contract, for Hardesty and Tait for their on-air reporting services. Roberts apparently told Warfield how much such work Hardesty had performed. Respondent official Warfield replied that Hardesty and Tait were not covered by the contract, and that Hardesty had not done the volume of work she (Roberts) claimed.

Roberts then requested to see the schedules or logs or any information that the Respondent could provide to support Warfield's statement that Hardesty had not done the amount of work alleged. Warfield denied the request for information.

On June 14 or 15, Roberts was told by Warfield that the information requested on March 10 regarding Hardesty was not available and never existed.

The General Counsel alleges as an unfair labor practice the delay in furnishing the information requested.

2. Analysis

The General Counsel alleges that Respondent's failure to furnish it with the financial documents and its 3-month delay in providing information concerning the performance of bargaining unit work by Hardesty violate Section 8(a)(5) and (1).

a. *The request for the financial documents*

The General Counsel argues that the Union is entitled to such documents because: (a) Respondent brought a financial issue into the negotiations by asserting that its reason for the late pension and welfare payment was

[2] The units involved are all staff announcers, newsmen, news announcers, and freelance performers.

[3] It should be noted that Warfield testified that he told Paul that cash-flow "considerations," not "problems" caused the payments to be made when they were. I need not decide this question in view of my disposition of this issue. I also do not deem it to be a critical factor in the decision of this matter. Cash-flow "problems" or "considerations" essentially means that Respondent had some concern regarding the availability of cash to pay its current expenses.

caused by cash-flow problems,[4] and it therefore was required to support its statement with the financial records pursuant to *NLRB v. Truitt Mfg. Co.*,[5] and (b) they were relevant and necessary to the Union's performance of its duty as collective-bargaining representative in that the documents would assist it in determining whether to file a grievance.

I am unable to agree with the General Counsel on either theory. The principle of *Truitt* is that good faith in collective-bargaining negotiations requires that an employer resisting a demand for higher wages must substantiate its claim of inability to pay such increases. The reason for the requirement that proof be supplied was that it is the essence of good faith that honest claims be made during collective bargaining.

In contrast, the question concerning the late payment for pension and welfare was raised solely because the union negotiator became aware of the recent payment for several past months and not because it was an issue for negotiations. Warfield, in citing cash-flow problems as the reason for the alleged overdue payment, did not claim that Respondent was unable to or would not make the payment.[6] He was simply explaining why it was necessary to defer it. In fact, the payments were up to date at the time of the hearing. This is thus not a situation, as in *Truitt*, where an employer refuses to agree to a union demand because of a claimed inability to pay it and he is then obligated to justify his position. I do not believe that *Truitt* was intended to require an employer to furnish all of its financial documents and data in support of a claim that it deferred, without union complaint, pension and welfare contributions because of cash flow problems.

As to the General Counsel's second theory,

> It is well settled that an employer has a duty to provide upon request such information as may be relevant and reasonably necessary to the union in the performance of its duty as collective bargaining representative. . . . The test of the union's need for such information is simply a show of "probability that the desired information was relevant, and that it would be of use to the union in carrying out its duties and responsibilities."[7]

Although generally the Union would be entitled to information including payroll data to determine whether Respondent was in compliance with the fund contributions requirements under the contract,[8] I do not believe that the materials requested, "all financial information, documents and data that the Company had," is relevant or reasonably necessary to the Union in the performance of its duties. The sole issue was whether the pension and welfare contributions were timely received by the Union. I cannot find any way that all financial records of Respondent would be even remotely relevant or reasonably necessary to the question of the pension and welfare contributions which were in fact made by Respondent. In this connection I have noted the fact that in the past Respondent has made payments 2 to 3 months late apparently without complaint by the Union, and that it was uncontradicted that Respondent's practice was to make such payments on an irregular basis.

I will accordingly recommend dismissal of that part of the complaint which alleges a failure by Respondent to furnish the Union with financial information relevant to Respondent's claim that a cash flow problem caused it to be delinquent in submitting pension and welfare fund statements and contributions to the Union.

b. *The request for information concerning the performance of bargaining unit work*

The Board has held that information sought concerning the performance of unit work by nonunit employees "is essential to the union in policing of the collective-bargaining agreement."[9] The need for such information is premised on the fact that the performance of such work would result in the loss of unit work for other employees.

The Board has consistently held that although information with respect to unit employees was presumptively relevant, the Union "must ordinarily demonstrate relevance to a bargainable issue" in order to obtain information concerning nonunit employees.[10]

Here there is no question that the Union properly sought information concerning nonunit employees Hardesty and Tait. At a grievance meeting, union official Roberts properly requested schedules and air logs to ascertain whether the two employees were being properly compensated, pursuant to the collective-bargaining contract, for the bargaining unit work they were performing. In requesting such records, the Union was acting in furtherance of its obligation to ensure that unit work was compensated at the contractually prescribed rate, and to consider whether a grievance should be filed concerning Respondent's alleged failure to pay the wages provided for in the contract for the unit work performed.

Respondent's unexplained 3-month delay in answering the request was unreasonably long. It was incumbent on Respondent to respond as soon as the request for the schedules and air logs was made.[11]

I accordingly find and conclude that, by unreasonably delaying for 3 months the furnishing of the information requested by the Union, Respondent violated Section 8(a)(5) and (1) of the Act. However, inasmuch as the information—that the schedules and air logs were not available and never existed—was transmitted to the Union, I shall not order that any such material be furnished to the Union.

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[4] I view this issue in a light most favorable to the Union that Respondent claimed its tardy payments were due to cash flow problems.

[5] 351 U.S. 149 (1956).

[6] *Rochester Institute of Technology*, 264 NLRB 1020 (1982), enf. denied 724 F.2d 9 (2d Cir. 1983); *Milbin Printing, Inc.*, 218 NLRB 223 (1975), rev. 358 F.2d 496 (2d Cir. 1976).

[7] *Stecher's Supermarket*, 264 NLRB 761, 762 (1982).

[8] Id.

[9] *Jaggars-Chiles-Stovall, Inc.*, 249 NLRB 697, 701 (1980).

[10] *Leland Stanford Jr. University*, 262 NLRB 136, 152–153 (1982).

[11] *Aeolian Corp.*, 247 NLRB 1231, 1244 (1980); *Ellsworth Sheet Metal*, 232 NLRB 109 (1977).

B. *Conditioning of Agreement on the Withdrawal of the Charge and the Arbitration Demands*

1. Facts

a. *The bargaining session of March 22*

Pierre Sutton, Respondent's president, began the meeting by noting the family nature of the business and his relationship with the employees. Union official Paul testified that Sutton stated that he would like to see the negotiations end quickly, adding that "any resolution of these negotiations would have to contain AFTRA withdrawing the unfair labor practice charges and the arbitrations.[12] Paul later testified that Sutton's statement was "for a successful resolution of this contract, the union would have to withdraw the unfair labor practice charge and the arbitrations."

Union official Roberts testified that Sutton stated that Respondent "was insisting that as part of the final package, the unfair labor practices and the arbitrations filed against the company by AFTRA be withdrawn."

Sutton did not testify. Respondent official Warfield testified that Sutton stated that Respondent was about to make a proposal to the Union, and he made "references" to the outstanding charge and arbitrations "as part of our agreement to try to resolve all of these issues."

Paul and Roberts did not reply to Sutton's remarks.

b. *The bargaining session of June 4*

Paul and Warfield met privately at this meeting and discussed certain items not yet agreed on such as holidays, vacations, and salaries. During their meeting, Warfield told Paul that "contingent upon any successful resolution of this contract would have to be the withdrawal of the unfair labor practice charges and the arbitrations." Paul replied that the charge and the arbitrations were not a part of the negotiations, and a successful agreement would have to be negotiated with the items on the bargaining table. Paul added that if an agreenent was reached with Roberts concerning the arbitrations, they would be therefore settled. Paul also said that, if the parties reached agreement on a contract, the unfair labor practice charge and the arbitrations could be discussed and settled.

2. Analysis

The General Counsel alleges that these two incidents support a finding that Respondent conditioned reaching a collective-bargaining agreement on the Union's withdrawal of the unfair labor practice charge and the arbitration demands.

Respondent's proposal that the Union withdraw its charge and the arbitration demands is a nonmandatory subject of bargaining.[13] It is well settled that insistence to impasse on a nonmandatory subject of bargaining is a violation of Section 8(a)(5) and (1) of the Act.[14]

Of course, no party may withhold agreement on the condition that the other withdraw its charge. But such matters may be raised and discussed if the suggested withdrawal is not held out as a condition on which agreement depends.

I am unable to find that the statements of Sutton and Warfield amounted to a condition that no agreement would be reached unless the charge and arbitration demands were withdrawn.

Assuming the accuracy of the union witnesses' testimony concerning Sutton's and Warfield's statements, I find

> [I]n contemplation of agreement [respondent] sought a broader agreement which would resolve all matters in dispute—a tack not unusual in concluding labor management disputes.[15]

Moreover, even assuming that Respondent's comments could be considered that, as a condition precedent to the reaching of an agreement, the Union withdrew its charge and arbitration demands, such a proposal is not per se illegal. However, Respondent could not insist to impasse on such a proposal and could not legally insist on its acceptance "in the face of a clear and expressed refusal by the Union to bargain about the [nonmandatory subjects.]"[16]

In this case, the Union did not reply to Sutton's statement made at the March 22 meeting. Paul's statement to Warfield at the June 4 meeting (that the charge and arbitration demands could be discussed and settled after the conclusion of an agreement) could be viewed as a condition subsequent to the reaching of an agreement—in other words as a counteroffer to Respondent's demand that the withdrawal be a condition precedent to the reaching of a contract. In any event, the evidence establishes that the Union only for the first time on June 4 clearly and unequivocally refused to bargain about the nonmandatory bargaining subject, and Respondent did not thereafter demand that the charge and arbitration demands be withdrawn. I accordingly find that Respondent did not insist to the point of impasse that they be withdrawn.[17]

I will accordingly recommend that this allegation be dismissed.

Conclusions of Law

1. Respondent Inner City Broadcasting Corporation is and at all times material herein, has been, an employer engaged in commerce within the meaning of the Act.

2. American Federation of Television and Radio Artists, New York Local, AFL-CIO is a labor organization within the meaning of the Act.

3. By unduly delaying in providing the Union with information concerning schedules and air logs which related to the performance of bargaining unit work by its em-

[12] On March 3 and 21, 1983, the Union filed demands for arbitrations pursuant to the contract.

[13] *NLRB v Carpenters Local 964*, 447 F.2d 643, 646 (2d Cir. 1971).

[14] *NLRB v. Wooster Division of Borg-Warner*, 356 U.S. 342, 349 (1958).

[15] *Carlsen Porsche Audi, Inc.*, 266 NLRB 141, 149-150 (1983).

[16] *Union Carbide Corp.*, 165 NLRB 254, 255 (1967), enfd. 405 F.2d 1111 (D.C. Cir. 1968).

[17] *Laredo Packing Co.*, 254 NLRB 1, 18-19 (1981).

ployees, Respondent violated Stection 8(a)(5) and (1) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

5. Respondent has not violated the Act, as alleged in the complaint, by (a) failing or refusing to furnish the Union with financial information relevant to Respondent's claim that a cash flow problem has caused it to be delinquent in submitting pension and welfare fund statements and contributions to the Union in a timely and accurate fashion or by (b) conditioning the reaching of any collective bargaining agreement with the Union on the Union's withdrawal of the unfair labor practice charge and the arbitration demands.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find it necessary to order the Respondent to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Inasmuch as the information concerning the schedules and air logs was furnished to the Union, although as I found, after an unreasonable delay, I shall not order that any such material be furnished to the Union.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[18]

ORDER

The Respondent, Inner City Broadcasting Corporation, New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Delaying in complying with the requests of American Federation of Television and Radio Artists, New York Local, AFL-CIO for information necessary for, and relevant to, the Union's performance of its function as the exclusive collective-bargaining representative of Respondent's employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its place of business in New York, New York, copies of the attached notice marked "Appendix."[19] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ordered that the complaint be dismissed insofar as it alleges violations not specifically found herein.

[18] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[19] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."